

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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3  
4 In the Matter of )

5 )  
6 MUR 6145 )

7 BAY AREA HOUSTON ECONOMIC )  
8 PARTNERSHIP )

9 ROBERT MITCHELL, PRESIDENT )

10 BAY OAKS COUNTRY CLUB, INC. )  
11

**CASE CLOSURE UNDER THE  
ENFORCEMENT PRIORITY  
SYSTEM**

12 **GENERAL COUNSEL'S REPORT**

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14 Under the Enforcement Priority System, matters that are low-rated

15  
16 are forwarded to the Commission with a recommendation for dismissal. The

17 Commission has determined that pursuing low-rated matters compared to other higher-rated  
18 matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to  
19 dismiss these cases. The Office of General Counsel scored MUR 6145 as a low-rated matter.

20 In this matter, the complainant, John Wieder, states that he was the 2008 Libertarian  
21 candidate for Congress from Texas' 22<sup>nd</sup> Congressional District. According to the  
22 complainant, he was improperly excluded from a debate held on October 20, 2008, between  
23 the Democratic and Republican congressional candidates, which was co-sponsored by the  
24 Bay Area Houston Economic Partnership ("BAHEP"),<sup>1</sup> a nonprofit corporation, and Robert  
25 Mitchell, BAHEP's president. Attached to the complaint is a news article quoting  
26 Mr. Mitchell as stating that only the two "leading" candidates, the Democratic incumbent and  
27 the Republican challenger, had been invited to the debate. The complainant asserts that his

<sup>1</sup> According to public records, BAHEP is organized pursuant to 26 U.S.C. § 501(c)(6) of the Internal Revenue Code ("I.R.C."), which applies to nonprofit business leagues and other nonprofit business organizations, see, e.g., <http://nccdataweb.urban.org/PubApps/showVals.php?ft=bmf&cin=760112168>

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1 exclusion from the debate constituted an illegal corporate contribution from BAHEP to the  
2 two major party candidates and an excessive contribution from Mr. Mitchell. In addition, the  
3 complainant maintains that Bay Oaks Country Club, Inc. ("Bay Oaks"), the forum for the  
4 debate, may have donated the use of its facilities at no charge which, he states, would also  
5 constitute an illegal corporate contribution.

6 In their joint response, BAHEP and Mr. Mitchell state that the debate featured the two  
7 "primary candidates" for Texas' 22<sup>nd</sup> Congressional District. They take the position that the  
8 debate complied with the Federal Election Campaign Act of 1971, as amended ("the Act")  
9 and the Commission's regulations, because: 1) BAHEP is a nonprofit organization; 2) at  
10 least two candidates participated in the debate; and 3) BAHEP did not endorse any of the  
11 candidates. BAHEP and Mr. Mitchell also state that a case filed in Small Claims Court by  
12 the complainant against Mr. Mitchell alone, which made allegations similar to those at issue  
13 here, was dismissed.

14 In its response, Bay Oaks states that, as one of its members, BAHEP was entitled to  
15 use its room for the debate without incurring "room charges;" however, Bay Oaks also states  
16 that BAHEP was responsible for food and beverage costs, for which the latter paid. Bay  
17 Oaks maintains that it was not involved in the debate in any other way.

18 Although not stated, it appears that the complainant may be suggesting that an in-kind  
19 corporate contribution could have occurred when the respondents, BAHEP and Mr. Mitchell,  
20 failed to employ pre-established, objective criteria for participation in the debate, as set in

1 11 C.F.R. § 110.13.<sup>2</sup> Unfortunately, the respondents did not specifically provide what criteria,  
2 if any, they used to select the candidates. However, based on the news article attached to the  
3 complaint, as well as the response, it appears that BAHEP and Mr. Mitchell invited the two  
4 candidates who were leading in the polls. In contrast, the complainant seems to have  
5 received only marginal electoral support prior to the debate.<sup>3</sup> Thus, it appears that BAHEP  
6 and Mr. Mitchell complied with the Commission's requirement that debate staging entities  
7 apply pre-established, objective criteria to select the debate participants.

8 Accordingly, in light of Bay Oaks' response, it appears that any potential in-kind  
9 corporate contribution stemming from the debate would have been through BAHEP, given  
10 BAHEP's status as a member of the country club and the fact that it reimbursed the country  
11 club for the refreshments used during the debate. We note, however, that although the  
12 Commission's "candidate debate" regulations, as set forth in 11 C.F.R. § 110.13, apply to  
13 nonprofit organizations organized under sections 501(c)(3) and (4) of the I.R.C., while  
14 respondent BAHEP is organized pursuant to section 501(c)(6), it appears that BAHEP's and  
15 Mr. Mitchell's adherence to the substantive aspects of the regulations are consistent with the

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<sup>2</sup> 11 C.F.R. § 110.13 permits "[n]onprofit organizations," including corporations, that are "described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties" to "stage candidate debates in accordance with this section and 11 C.F.R. § 114.4(f)." 11 C.F.R. § 110.13(a)(1). The regulations leave the structure of the debate to the discretion of the staging organization, provided that the debates include at least two candidates, the organization does not arrange the debates in a manner that promotes or advances one candidate over another, and the criteria for candidate selection are objective and pre-established, pursuant to 11 C.F.R. §§ 110.13(b) and (c).

<sup>3</sup> For example, one pre-debate poll showed the complainant receiving support from only 3% of likely voters. The complainant, however, states that according to an internal pollster he was tracking at 10% prior to the debate at issue in this case. Ultimately, the Republican congressional candidate received 52% of the vote, the Democratic candidate received 45% of the vote, and the complainant received 2% of the vote.

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way the Commission has applied these regulations in the past.<sup>4</sup> Therefore, in furtherance of the Commission's priorities and resources, and relative to other matters pending on the Enforcement docket, the Office of General Counsel believes that the Commission should exercise its prosecutorial discretion and dismiss the matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

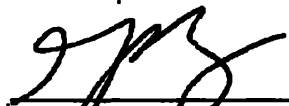
### **RECOMMENDATIONS**

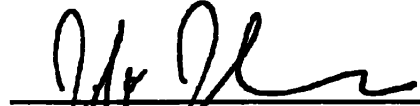
The Office of General Counsel recommends that the Commission dismiss MUR 6145, close the file, and approve the appropriate letters.

Thomasenia P. Duncan  
General Counsel


12/7/09  
Date

BY:

  
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<sup>4</sup> See MUR 5650 (Associated Students of the University of Arizona) (Commission dismissed challenge to debate sponsored by university that was exempt from taxation under 26 U.S.C. § 115, noting, that when an entity meets other substantive criteria under the regulations, the tax status of the entity alone is not determinative); see also MURs 5817, 5836, 5852, 5858, and 5863 (Debate Cases (From the '06 Cycle)) (Commission dismissed complaints against respondent debate staging organizations where complainants appeared to receive marginal electoral support and evidenced little campaign organization, and respondents apparently used pre-established objective criteria).

  
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